

The Identity Project

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Executive Director for the Office of Privacy and Disclosure
Social Security Administration, G-401 WHR
6401 Security Blvd.
Baltimore, MD 21235

by e-mail to <FOIA.Public.Liaison@ssa.gov>

FREEDOM OF INFORMATION ACT APPEAL **(SSA-2020-005651)**

Dear FOIA Appeals Officer:

This is an appeal pursuant to the Freedom of Information Act, 5 U.S.C. §552.

On January 21, 2016, we submitted a FOIA request by e-mail to the Department of Homeland Security (DHS) for “access to and copies of all records of or pertaining to individuals presenting driver’s licenses that are or were not considered compliant, or from states or territories that are or were not considered compliant, with the REAL-ID Act of 2005, for purpose of accessing Federal facilities...”

This request was received by the DHS FOIA Office by e-mail the same day it was sent, January 21, 2016, and was assigned DHS reference number 2016-HQFO-00209.

On October 19, 2020, we were notified by e-mail by the Freedom of Information Officer for the Social Security Administration (SSA) that, “The Department of Homeland Security (DHS) referred your Freedom of Information Act (FOIA) request to the Social Security Administration (SSA) on August 31, 2020 because some information in their files originated with SSA.... I am responding to your request for a fee waiver for your FOIA request. I have decided not to waive or reduce the fee.”

We appeal this fee and fee category determination including:

1. The failure to consider or apply the criteria for FOIA fees in § 402.155(b); and
2. The determination, pursuant to 20 C.F.R. § 402.185(b), that “furnishing you this information is not in the public interest.”

The SSA FOIA Officer stated in her fee determination letter, “Section 1106(c) of the Social Security Act (42 U.S.C. § 1306(c)) provides that we charge full cost for search and reproduction of records when the request is for a purpose not directly related to the administration of a program under the Social Security Act.”

However, this statement is not entirely correct. 42 U.S.C. § 1306(c) provides that in certain circumstances the SSA “may require the requester to pay the full cost ... of providing such information.” But while this provision of the statute *authorizes* such charges (“may charge...”), it does not *require* that such charges be imposed. In fact, the SSA has by regulation created significant mandatory exceptions to these charges, including those in 20 CFR § 402.155.

In contrast to the permissive statutory authority granted to the SSA by 42 U.S.C. § 1306(c), the limitations on fees that the SSA has imposed on itself by regulation in 20 CFR § 402.155(b) are mandatory: “If you are an educational institution or a non-commercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and your request is not for a commercial use, we *will* charge you only for the duplication of documents. Also, we *will not* charge you the copying costs for the first 100 pages of duplication.” [emphasis added]

20 CFR § 402.165(j) provides that this fee schedule “does not apply to requests for records of Social Security number holders, wage earners, employers, and claimants when the requests are governed by section 1106 of the Social Security Act and by §§ Sections 402.170 and 402.175.” But this request is not for “records of Social Security number holders, wage earners, employers, and claimants”, and thus is subject to § 402.165 and to the limitations on fees for certain requesters in § 402.155.

The SSA FOIA officer did not mention 20 CFR § 402.155 in their fee determination. But the SSA regulations must be interpreted to give meaning to each provision, including this one.

The DHS has already determined, with respect to this request, that we are an educational institution or a non-commercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and that our request is not for a commercial use.

The SSA FOIA Officer provides no basis for disputing or overruling that determination.

As we explained in our original request:

“As a representative of the news media we are only required to pay for the direct cost of duplication after the first 100 pages. Through this request, we are gathering information on DHS policies and procedures that is of current interest to the public as part of widespread public interest in implementation of the REAL-ID Act and DHS policies, procedures, and practices related to access to public facilities and access transportation by airlines and other transportation carriers, and what if any legal basis, in what circumstances, the DHS believes exist for denial of access to facilities and/or transportation. This information is being sought on behalf of The Identity Project (“IDP”). IDP is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

“This information will be made available to the public. The principal activity of IDP is

publication of the informational and educational Web site at <<http://www.papersPlease.org>>, where we have published documents obtained in response to our previous FOIA requests.

“Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding of government operations and activities. The records we are requesting clearly relate to government operations and activities in the management and control of access to Federal facilities and transportation by Federally-licensed air carriers. It is in the public interest for the public to know about the policies and practices which affect public access to public facilities, and the legal basis or lack thereof for these policies and practices. The Identity Project is a nonprofit organization with no commercial interest in this information.”

As a news media requester, we are entitled to the fee limitations in 20 CFR § 402.155(b). Pursuant to this section of your regulations, we may be charged only for the duplication of documents.¹

Even if we were not entitled to treatment as a news media requester, a waiver or reduction of fees is appropriate because furnishing this information is likely to contribute significantly to public understanding of the operations or activities of the government and is not in our commercial interest.

We are a project of a nonprofit tax-exempt organization that has no commercial activities and neither has nor could have, consistent with its status, any commercial interest in the requested records.

The SSA FOIA Officer did not explain why they “determined that furnishing you this information is not in the public interest.” This is a conclusionary boilerplate denial without stated basis. As such, it fails to satisfy the requirements of law, regulations, and administrative due process.

This request satisfies each of the criteria for fee waiver or reduction spelled out in § 402.185:

- (1) “How, if at all, do the records to be disclosed pertain to the operations or activities of the Federal Government?”

To the extent that they concern the SSA, the requested records concern people who have presented ID that was not considered compliant, or from states or territories that are or were not considered compliant, with the REAL-ID Act of 2005, for purpose of accessing SSA facilities. These records may include how many such people there have been, whether they have been permitted to enter SSA facilities or obtain SSA services, and what SSA policies, if any, apply to these circumstances.

This is, it would seem to be beyond question, information pertaining to the operations or activities of the SSA as a component of the Federal Government?

- (2) “Would disclosure of the records reveal any meaningful information about government operations or activities? Can one learn from these records anything about such operations that is not already public knowledge?”

Policies and practices with respect to access to SSA offices have profound importance and potential collateral consequences beyond access to SSA services.

1. So far as we know, the responsive records consist of digital files containing e-mail messages, in file formats such as EML, PST, or MBOX format. We have no reason to think that any of the responsive records consist of documents.

In general, there is no requirement to possess, carry, or display a Social Security card. It is purely a reminder of a number which has been assigned to an individual's Social Security account.

But although a Social Security account number card was never intended as a identity credential, many states and territories, in implementing the REAL-ID Act of 2005, have defined a Social Security card as one of the prerequisites for obtaining a REAL-ID compliant drivers license or ID.

As a result, some unknown number of people are seeking to obtain a new or replacement Social Security card in order to obtain a REAL-ID compliant drivers license or state ID. In some cases, obtaining a new or replacement Social Security card requires an in-person visit to an SSA office.

Members of the public need to know whether, if they have neither a REAL-ID compliant ID nor a Social Security card, they will face a "Catch-22" in which they are unable to obtain a REAL-ID compliant ID because they don't have a Social Security card, but they are unable to get into an SSA office to obtain a Social Security card because they don't have a REAL-ID compliant ID.

The requested records will show whether this has happened, and if so how often and on what basis, or whether it has not happened. In either case, this information is of great public value. Such a "Catch-22" could have implications for access to many other facilities, programs, and services.

- (3) "Will the disclosure advance the understanding of the general public as distinguished from a narrow segment of interested persons? Under this factor we may consider whether the requester is in a position to contribute to public understanding. For example, we may consider whether the requester has such knowledge or expertise as may be necessary to understand the information, and whether the requester's intended use of the information would be likely to disseminate the information among the public. An unsupported claim to be doing research for a book or article does not demonstrate that likelihood, while such a claim by a representative of the news media is better evidence."

While we believe that some of the requested information will be readily comprehensible to the general public – "Have people seeking Social Security cards in order to obtain REAL-ID been turned away at the entrances to Social Security offices because they don't have REAL-ID?" – we are also among the experts best qualified to interpret any less self-explanatory responsive records.

The Identity Project has been one of the leading sources of information and expertise about the REAL-ID Act, its implementation, and its implications since the passage of that Act in 2005. I have testified on behalf of the Identity Project as an expert on the REAL-ID Act before legislative committees in multiple states. Our website and blog, where we have posted responses (and analyses of them) to our previous FOIA and state public records requests related to the REAL-ID Act, are among the most comprehensive and frequently-cited explanatory resources concerning the REAL-ID Act. We are regularly consulted and quoted by other national news media as experts on the REAL-ID Act.

No other organization or expert is better qualified to interpret the responsive records.

- (4) "Will the contribution to public understanding be a significant one? Will the public's understanding of the government's operations be substantially greater as a result of the

disclosure?”

Whether members of the public – and if so, how many of them, and on what basis – have been denied access to SSA facilities because they do not have ID compliant with the REAL-ID Act will be significant in and of itself. Because obtaining ID compliant with the REAL-ID Act could be a prerequisite to access to other facilities, programs, or services, it is also likely to contribute significantly to understanding of the implications of the REAL-ID Act for those other facilities, programs, or services. It will also contribute to the ability of the public to provide informed input to the ongoing Congressional debate regarding possible amendment or repeal of the REAL-ID Act.

Please also note that our office address has changed since our request was submitted to the DHS more than four years ago. The DHS FOIA office is aware that our address has changed, and should have provided you with our current address when they referred a portion of this request to you.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties issues
The Identity Project (PapersPlease.org)